YII SING CHIU v. AIKBEE TIMBERS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[ORIGINATING SUMMONS NO: WA-24NCVC-2452-12-2020]
27 SEPTEMBER 2022

Abstract – *The housing developer is responsible for the 'preliminary management period' which, by the definition provided in s. 46 of the Strata Management Act 2013, commences from the date of delivery of vacant possession until one month after the management corporation ('MC') holds its first annual general meeting. The developer has the responsibility for the very first determination and imposition of the maintenance charges and the contribution to the sinking fund. The maintenance charges and the contribution to the sinking fund after the expiry of the 'preliminary management period' is then the responsibility of the MC. The change in the maintenance charges would only take place if there was a change in the monthly expenses and/or yearly expenses brought about by a change in any of the 26 items set out the Fifth Schedule of Schedule H of the Housing Development (Control and Licensing) Regulations 1989.*

LAND LAW: *Housing developer – Rates – Validity – Different rates of maintenance charges and contribution to sinking fund imposed on apartment parcels and commercial parcels – Construction of provisions of Strata Management Act 2013, Strata Titles Act 1985, Housing Development (Control & Licensing) Regulations 1989 – Whether determination of and imposition of different rates of maintenance charges and contribution to sinking fund between apartment parcels and commercial parcels by developer valid in law*

LAND LAW: *Management corporation – Rates – Validity – Different rates of maintenance charges and contribution to sinking fund imposed on apartment parcels and commercial parcels – Construction of provisions of Strata Management Act 2013, Strata Titles Act 1985, Housing Development (Control & Licensing) Regulations 1989 – Whether determination of different rates of maintenance charges and contribution to sinking fund by management corporation valid in law*

The applicant was one of the proprietors of a serviced apartment parcels ('apartment parcels') in an integrated/mixed development project that consisted of a retail complex/shopping mall and car park ('commercial parcels') known as Pearl Suria - Menara Pearl Point 2 ('Pearl Suria'). The first respondent was the developer of Pearl Suria and was the proprietor of the retail complex/shopping mall. The second respondent was the proprietor of the car park. The third respondent was the management corporation ('MC') of Pearl Suria. The share units for all the parcels had been duly

allocated and registered with the Commissioner of Building ('COB'). Vacant possession of the parcels was deemed to be delivered on 21 April 2016 and the first respondent maintained and managed Pearl Suria until the same was handed over to the MC. The first respondent, during its time in charge of maintenance and management, imposed the following rates per share unit: (i) apartment parcels – maintenance charges at RM2.22 and contribution to sinking fund at RM0.30; and (ii) commercial parcels – maintenance charges at RM0.11 and contribution to sinking fund at RM0.06. The applicant discovered about the rates during the first annual general meeting ('AGM') of the MC. The MC resolved to maintain the rates that had been imposed by the first respondent until 31 March 2019 and, thereafter, commencing 1 April 2019 to increase the maintenance charges for apartment parcels by a further RM0.70 to RM2.92 with no change for the commercial parcels. The applicant objected to the different rates between the apartment parcels and the commercial parcels but was voted out. The MC re-affirmed the different rates at its second AGM. The applicant lodged a complaint with the COB but was advised to refer the matter either to the Strata Management Tribunal ('Tribunal') or a court of competent jurisdiction if he was not satisfied with the response given. The applicant filed a claim against the MC at the Tribunal and the claim was struck out with liberty to file afresh. In this originating summons ('OS'), the applicants sought the determination of this court as to the validity of the different rates of maintenance charges and contribution to the sinking fund imposed on apartment parcels and commercial parcels. The questions for determination sought were, whether on the true construction of the provisions of the Strata Management Act 2013 ('SMA'), the Strata Titles Act 1985 ('STA'), the Housing Development (Control and Licensing) Regulations 1989 ('HDR'), in particular, Schedule H as prescribed in reg. 11: (i) the determination of and imposition of the different rates of maintenance charges and contribution to the sinking fund between apartment parcels and commercial parcels by the first respondent as the developer of Pearl Suria was valid in law; and (ii) the determination of different rates of the maintenance charges and contribution to the sinking fund by the third respondent as the MC of Pearl Suria was valid in law. The respondents submitted that (i) the failure of the applicant to exhaust the statutory domestic remedy provided by sub-s. 52(6) of the SMA was fatal. The statutory domestic remedy provided was not utilised by the applicant and instead, the applicant resorted to this court which was an abuse of the process of the court; and (ii) the applicant ought to have proceeded to file an application for judicial review to challenge the decision of the Tribunal instead of filing the OS.

Held (allowing originating summons):

(1) The developer had determined the maintenance charges at RM2.22 for apartment parcels and RM0.11 for the commercial parcels while the contribution to the sinking fund was fixed at RM0.30 for the apartment

parcels and RM0.06 for the commercial parcels. This amount was imposed throughout the 'preliminary management period'. It was clear that the developer had, by fixing different rates for apartment parcels and commercial parcels, contravened cl. 19 of Schedule H of the HDR and s. 52(3) of the SMA. The rates must be the same during this period for all parcels whether it was an apartment parcel or a commercial parcel. In the instant case, the proprietors of the apartment parcels paid a massive RM2.22 per share unit for maintenance charges while the proprietors of the commercial parcels merely paid a token of RM0.11 per share unit. Apart from not complying with the formula to determine the amount per share unit held by each parcel owner, the calculation of the contribution to the sinking fund was also incorrect as it was not equivalent to 10% of the maintenance charges. Further, the first respondent had charged the proprietors of the apartment parcels RM0.30 as contribution to the sinking fund when the amount was only RM0.22 based on the fixed statutory formula *ie*, 10% of the maintenance charges. On the true construction of the relevant provisions, the imposition of different rates for maintenance charges and contribution to the sinking fund imposed by the first respondent was therefore unlawful, null and void. Question (i) was answered in the negative. (paras 30-32)

(2) The MC had only raised the maintenance charges for apartment parcels commencing 1 April 2019. The contribution to the sinking fund for apartment parcels and the rates for the commercials parcels were left unchanged. By maintaining the different rates for apartment parcels and commercial parcels as determined by the first respondent, the MC continued to apply the unlawful amounts determined by the former. For this, the amounts for the maintenance charges and contribution to the sinking fund maintained by the MC from 25 February 2019 to 31 March 2019 were unlawful, null and void. (para 35)

(3) The maintenance charges and the contribution of the sinking fund were paid by the proprietors which went into the accounts mentioned in sub-ss. 50(2) and 51(1) of the SMA. These monies could not be used for purposes other than those stated in sub-ss. 50(3) and 51(2) of the SMA. The MC was only allowed to impose different rates where the parcels were used for 'significantly different purposes'. Sub-section 60(3) of the SMA was not applicable in the instant case. The use of the parcels here had, from the beginning, been the same. Nothing had changed. The justification to impose a different rate by invoking sub-ss. 60(3) of the SMA was absent. On the true construction of sub-ss. 59(2) and 60(3) of the SMA, the imposition of different rates for maintenance charges and contribution to the sinking fund imposed by the MC was unlawful, null and void. Question (ii) was answered in the negative. (paras 41, 44 & 45)

(4) The questions in the instant OS concerned the proper interpretation to be accorded to certain provision of the SMA, STA and HDR. The questions concerned the formula or manner of calculating the maintenance charges and contribution to the sinking fund by the developer of a sub-divided building and thereafter, by the MC of the said building and to determine the questions whether the imposition of different rates on apartment parcels and commercial parcels were in accordance with the law. The proper forum to ventilate these questions of law was the High Court. The domestic remedy objection was without basis and was dismissed. (paras 49 & 50)

(5) There was no decision by the Tribunal determining the rights of the applicant and the MC. The threshold for judicial review had not arisen. Since the claim before the Tribunal was struck out, the claim was to be regarded as never been filed. Section 106 of the SMA provided that the jurisdiction of the court was not excluded where the claim before the Tribunal was withdrawn, abandoned or struck out. The applicant then did not claim against the first and second respondents who were the appropriate contradictors for the declarations sought in this OS. Thus, the questions posed for this court's determination was not within the jurisdiction of the Tribunal. (para 52)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2021] 4 CLJ 775 FC ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***

Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation [2020] 10 CLJ 285 FC ***(refd)***

Muhamad Nazri Muhamad v. JMB Menara Rajawali & Anor [2019] 10 CLJ 547 CA ***(refd)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***

Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505 FC ***(refd)***

Sodalite Sdn Bhd & Ors v. 1 Mont' Kiara Dan Kiara 2 Management Corporation & Ors [2021] 7 CLJ 633 HC ***(refd)***

Workmen of Indian Standards Institution v. Management of Indian Standards Institution [1976] 1 LLJ 36 ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), Schedule H

Strata Management Act 2013, ss. 46, 48, 49, 50(2), (3), 51(1), (2), 52(2), (3), (6), 53, 54, 55, 56, 58(c), 59(2), 60(3), 62, 106

For the appellant - Viola De Cruz; M/s VL Decruz & Co
For the 1st & 2nd respondents - Wong Zhi Khung; M/s Michael Chow
For the 3rd respondent - Koo Jia Hung; M/s Chee Hoe & Assocs

Reported by Lina E

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] In the instant originating summons the applicant, one of the proprietors of a serviced apartment parcel ("apartment parcels") in an integrated/mixed development project that consist of a retail complex/shopping mall and car park ("commercial parcels") identified as Pearl Suria - Menara Pearl Point 2 ("Pearl Suria") sought the determination of this court as to the validity of the different rates of maintenance charges and contribution to the sinking fund imposed on apartment parcels and commercial parcels.

[2] The questions for determination sought were framed as follows:

(i) whether on the true construction of the provisions of the Strata Management Act 2013 ("SMA"), the Strata Titles Act 1985 ("STA"), the Housing Development (Control and Licensing) Act 1966, the Housing Development (Control and Licensing) Regulations 1989, in particular, Schedule H as prescribed in reg. 11:

   (a) the determination of and imposition of the different rates of maintenance charges and contribution to the sinking fund between apartment parcels and commercial parcels by the first respondent as the developer of Pearl Suria is valid in law; and

   (b) the determination of different rates of the maintenance charges and contribution to the sinking fund by the third respondent as the management corporation ("MC") of Pearl Suria is valid in law?

[3] On 23 June 2022, I allowed the originating summons by answering both questions in the negative and made the following declarations which can be summarised as follows:

(i) a declaration that the difference of the maintenance charges and the contribution to the sinking fund imposed by the first respondent on apartment parcels on one hand and commercial parcels on the other hand from the date of vacant possession (21 April 2016) to one month from the date of the 1st Annual General Meeting ("1st AGM") held by the MC (25 February 2019) was illegal, null and void;

(ii) a declaration that the difference of the maintenance charges and the contribution to the sinking fund maintained by the MC on apartment parcels on one hand and commercial parcels on the other hand from the date the MC took over the function from the first respondent (26 February 2019) to the date before an amendment to the rates were to take effect (31 March 2019) was illegal, null and void;

(iii) a declaration that the difference of the maintenance charges and the contribution to the sinking fund imposed by the MC on apartment parcels on one hand and commercial parcels on the other hand from 1 April 2019 to the present date is illegal, null and void; and

(iv) a declaration that the maintenance charges and the contribution to the sinking fund must be the same for all parcels, that is to say, RM2.22 and RM0.30 per share unit respectively?

[4] Based on the above declarations that were granted the following consequential orders were accordingly made:

(i) the first respondent as proprietor of the retail complex/shopping mall is to pay to the MC maintenance charges and contribution to the sinking fund at the rate of RM2.22 and RM0.30 per share unit respectively from 21 April 2016 to 25 February 2019;

(ii) the first respondent, as proprietor of the car park (whole floor parcel), to pay to the MC maintenance charges and contribution to the sinking fund at the rate of RM2.22 per share unit and RM0.30 per share unit respectively for the period from 21 April 2016 to the date of the sale of the car park (whole floor parcel) to the second respondent;

(iii) the second respondent as proprietor of the car park (whole floor parcel), is to pay the MC maintenance charges and contribution to the sinking fund at the rate of RM2.22 per share unit and RM0.30 per share unit respectively from the date of purchase of the car park (whole floor parcel) from the first respondent to 25 February 2019;

(iv) the first and second respondents are to pay to the MC maintenance charges and contribution to the sinking fund at the rate of RM2.22 per share unit and RM0.30 per share unit respectively from 25 February 2019 to 31 March 2019;

(v) the third respondent must hold an extraordinary general meeting (EGM) within one month from the date of this order to determine the maintenance charges and contribution to the sinking fund for the apartment parcels and for the commercial parcels comprising the retail complex and car park (whole floor parcel) at the same rate for all types of parcels as follows: either (a) RM2.22 per share unit and RM0.30 per

share unit respectively from 25 February 2019 until 31 March 2019 and RM2.92 per share unit and RM0.30 per share unit respectively from 1 April 2019 to date or (b) such other rate that is the same for all the parcels from 25 February 2019 onwards.

[5] In my judgment if at the EGM the latter is resolved then the amount fixed as maintenance charges for both the apartment parcels and commercial parcels ought to be the same for from 25 February 2019 and the contribution to the sinking fund be equivalent to 10% of the maintenance charges as statutorily provided.

Background

[6] Pearl Suria consists of 405 individual parcels comprising of (i) apartment parcels together with their respective accessory parcels ("apartment parcels") and (ii) commercial parcels comprising of retail complex/shopping mall and car park parcel (collectively referred to as "commercial parcels").

[7] The first respondent was the developer of Pearl Suria and is currently the proprietor of the retail complex/shopping mall held under individual strata title Pajakan Negeri 51392/MI/B2/2 No. Lot 101217, Mukim Petaling, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan with a total of 51,980 share units. The second respondent is the proprietor of the said car park held under individual strata title Pajakan Negeri 51392/M1/B2/1 No. Lot 101217, Mukim Petaling, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan with a total of 35,010 share units. The third respondent is the management corporation ("MC") of Pearl Suria and established under the STA. It is a body corporate and is governed by both the Strata Management Act 2013 ("SMA") and the STA. The share units for all the parcels have been duly allocated and registered with the Commissioner of Building ("COB"). Vacant possession of the parcels was deemed delivered on 21 April 2016 and the first respondent maintained and managed Pearl Suria until the same was handed over to the MC on 25 February 2019.

[8] The first respondent during its time in charge of maintenance and management imposed the following rates per share unit:

(i) apartments parcels – maintenance charges at RM2.22 and contribution to sinking fund at RM0.30;

(ii) commercial parcels – maintenance charges at RM0.11 and contribution to sinking fund at RM0.06.

[9] The applicant discovered the rates on 26 January 2019 during the 1st AGM of the MC. The rates were determined and imposed by the first respondent as developer of Pearl Suria from the time vacant possession was deemed given. At the 1st AGM the MC resolved to maintain the rates that

had been imposed by the first respondent until 31 March 2019, and thereafter commencing 1 April 2019 to increase the maintenance charges for apartment parcels by a further RM0.70 to RM2.92 with no change for the commercial parcels. The applicant objected to the different rates between the apartment parcels and the commercial parcels but was voted out which is not surprising as the first respondent and second respondent had 67% or majority of the total share units. The second respondent is the major shareholder of the first respondent and both has common directors.

[10] At its 2nd Annual General Meeting ("2nd AGM") held on 8 August 2020 the MC reaffirmed the different rates. On 11 March 2019, the applicant lodged a complaint with the COB regarding the imposition of the different rates. The COB responded by letter dated 28 August 2019, after obtaining clarification from the MC, advising the applicant to refer the matter either to the Strata Management Tribunal or a court of competent jurisdiction if he was not satisfied with the response given.

[11] The applicant filed a claim against the MC at the Strata Management Tribunal *vide* Claim No. TPS/W3258-10-2019. The claim was struck out with liberty to file afresh. On 31 December 2020, the applicant filed the instant originating summons seeking a determination of the questions mentioned above. The questions in the main concern the interpretation of the relevant provisions in legislations concerning the imposition of maintenance charges and contribution of the sinking fund. It was submitted that the applicant seeks to nullify the resolution passed by the MC at the 1st AGM to impose different rates falls within the jurisdiction of the Tribunal to hear and decide. The applicant argued that the declarations sought are wider than merely seeking to nullify the resolution and therefore this court is the forum to ventilate such questions and the interpretation of the various legislations.

Deliberations And Decision

[12] In this case the parties involved in imposing maintenance charges and contribution to the sinking fund, the subject matter of the instant case, begin with the developer and followed by the MC. The developer is governed by the Housing Development (Control and Licensing) Act 1966 and the Housing Development (Control and Licensing) Regulations 1989, in particular, sub-reg. 11(1) which concerns a building subdivided into parcels wherein the sale and purchase agreement of such parcels is prescribed in the form of Schedule H. The developer is further governed by Part V, Chapter 2 of the SMA, namely, ss. 47 to 55. Section 55 of the SMA provides the time when the developer transfers control of the management to the MC.

[13] The MC is governed by ss. 56 to 62 which is housed in Chapter 3 of the SMA. Amongst the duties and powers provided is the determination and imposition of the maintenance charges and contribution to the sinking fund and the collection thereof from the proprietors of the parcels.

Interpretation Of A Social Legislation

[14] At this point and before interpreting the relevant provisions, I kept in mind that I am interpreting social legislations. The Housing Development (Control and Licensing) Act 1966 and the regulations made thereunder including Schedule H and the SMA are social legislations.

[15] A statute is said to be a 'social legislation' when Parliament passes the statute for a beneficent reason with the intention to ease or facilitate the affairs of or protect a certain section or group of persons (see *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369).

[16] In *Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation* [2020] 10 CLJ 285 the Federal Court held:

> The SMA 2013 is without doubt, a social legislation. It was passed to facilitate the affairs of strata living for the good of the community or owners of the strata title. Being social in nature, the provisions of the SMA 2013 which safeguard community interests ought to receive a liberal interpretation and not a restricted or rigid one. Accordingly, where two different interpretations are possible, it is the one which favours the interest of the community over the interest of the individual that is to be preferred. This is in line with the aforementioned decisions in *Ang Ming Lee* and *Hoh Kiang Ngan.*

[17] In *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 the Federal Court held that the Housing Development (Control and Licensing) Act 1966 and the Housing Development (Control and Licensing) Regulations 1989 as 'social legislation' and in rendering their decision made the following pronouncements:

> [31] All legislation is social in nature as they are made by a publicly elected body. That said, not all legislation is 'social legislation'. A social legislation is a legal term for a specific set of laws passed by the legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class of persons. Given that one side always has the upper hand against the other due to the inequality of bargaining power, the State is compelled to intervene to balance the scales of justice by providing certain statutory safeguards for that weaker class. ...
>
> [33] ... When it comes to interpreting social legislation, the State having statutorily intervened, the Courts must give effect to the intention of Parliament and not the intention of parties. Otherwise, the attempt by the legislature to level the playing field by mitigating the inequality of bargaining power would be rendered nugatory and illusory.

and further adopted the following *dictum* of Bhagwati J in *Workmen of Indian Standards Institution v. Management of Indian Standards Institution* [1976] 1 LLJ 36 on social welfare legislation:

A We cannot forget that it is a social welfare legislation we are interpreting and we must place such an interpretation as would advance the object and purpose of legislation and give full meaning and effect to it in the achievement to (*sic*) its avowed social objective.

[18] As to how a social legislation is to be interpreted the Federal Court B held that the cardinal rule of construction which begins with the literal rule and only when the provision under construction is ambiguous will the meaning of the provision be determined by resorting to other methods of construction foremost of which is the purposive rule will be automatically displaced by the purposive rule of interpretation when it concerns the C interpretation of the protective language of social legislation. For avoidance of doubt the Federal Court enunciated that even where the provision of a social legislation or a statutory contract enacted thereunder is literally clear or unambiguous, the court no less shoulders the obligation to ensure that the said term or provision is interpreted in a way which ensures maximum D protection of the class in whose favour the social legislation was enacted. The above principle was reiterated in *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2021] 4 CLJ 775.

The Developer, Maintenance Charges And Sinking Fund

E **[19]** Clause 19 of Schedule H which must be made and is made part of the sale and purchase agreement of the apartment parcel between the applicant and the first respondent provides for the imposition of the maintenance charges and contribution to the sinking fund. Most importantly, the clause, which is a statutory sale and purchase agreement, provides the method of F calculating the maintenance charges. Clause 19 of Schedule H states:

(1) From the date the Purchaser takes vacant possession of the said Parcel, **the Purchaser shall pay to the Developer the charges, and the contribution to the sinking fund** for the maintenance and management of the building or land intended for subdivision into parcels and the common property **in accordance with the Strata** G **Management Act 2013.**

(2) The Purchaser shall pay the charges, and the contribution to the sinking fund for the first four (4) months in advance and any payment thereafter shall be payable monthly in advance.

H (3) Every written notice from the Developer to the Purchaser requesting for the payment of charges shall be supported by a charge statement issued by the Developer **in the form annexed in the Fifth Schedule and full particulars of any increase in the charges shall be reflected in the subsequent charge statement.** (emphasis added)

I

[20] The Fifth Schedule stated in sub-cl. 19(3) of Schedule H of the Housing Development (Control and Licensing) Regulations 1989 is a charge statement. It is this statement that supports the written notice requesting the proprietor of each parcel of the building to make the maintenance charges and contribution to the sinking fund which will go into the maintenance account and sinking fund account maintained by the developer. These monies will be utilised towards the expenses that are incurred for the maintenance and management of the building. This statutory function of the developer will continue until the time the MC takes over the function which is provided in the SMA.

[21] The charge statement provides how the maintenance charges are determined. An important component of the calculation is the share units assigned to a parcel by the developer's licensed land surveyor in the schedule of parcels that the developer had already filed with the COB.

[22] The Fifth Schedule sets out the estimated monthly expenses which consist of 26 items of expenses the description of which is listed in detail. These items cannot be amended without the prior written approval of the COB. The amount per proposed share unit for each parcel is calculated based on the following formula:

> "Total Expenses" divided by the "Total number of proposed share units assigned by the developer's licensed land surveyor to all parcels comprised in the housing development".

[23] It is clear that the calculation does not distinguish between the use of the parcels be it apartments for residential purpose or parcels for commercial purpose. The calculation is an addition of the total expenses from the 26 items, if applicable, divided by the total number of share units held by each parcel owner.

[24] As developer, the first respondent, is responsible for the 'preliminary management period' which by definition provided in s. 46 of the SMA commences from the date of delivery of vacant possession until one month after the MC held its 1st AGM. In the present case, the 'preliminary management period' ends on 25 February 2019, which is one month after the MC had conducted its 1st AGM. Thereafter, the responsibility of maintaining and managing Pearl Suria and collecting the maintenance charges and contribution to the sinking fund falls on the MC.

[25] The developer has the responsibility for the very first determination and imposition of the maintenance charges and the contribution to the sinking fund. These are statutory payments prescribed by Schedule H of the Housing Development (Control & Licensing) Regulations 1989. In the instant case, sub-cls. 18(2) and 19(2) of the sale and purchase agreement, based on Schedule H, entered between the developer and the purchaser of the parcel provides as follows:

A 18. Payment of service charges.

(1) ...

(2) From the date the Purchaser takes vacant possession of the said Parcel the Purchaser shall pay a fair and justifiable proportion of the costs and expenses for the maintenance and management of the
B common property and for the services provided. Such amount payable shall be determined according to the allocated share units assigned to the said Parcel by the Vendor's licensed land surveyors. The amount determined shall be the amount sufficient for the actual maintenance and management of the common property. ...

C 19. Sinking fund.

(1) ...

(2) The Purchaser shall, upon the date he takes vacant possession of the said Parcel, contribute to the sinking fund an amount equivalent to ten per centum (10%) of the service charges determined in
D accordance with subclause 18(2) and thereafter such contribution shall be payable monthly in advance.

[26] While the relevant subsections of s. 48 of the SMA provide as follows:

(1) A developer shall, during the preliminary management period and subject to the provisions of this Act, be responsible to maintain and
E manage properly the subdivided building or land, and the common property.

(2) The developer shall exercise the powers and perform the duties of the management committee of the management corporation from the time the management corporation comes into existence until the
F expiry of the preliminary management period.

[27] Subsection 52(2) of the SMA imposes an obligation on a proprietor to pay the charges that are determined by the developer in proportion to the share units assigned to each parcel. The calculation therefore is not different from the formula provided in the Fifth Schedule of Schedule H of the
G Housing Development (Control and Licensing) Regulations 1989. This is because the constant remains the share units that are assigned to each parcel. The 'preliminary management period' which begin from the date of vacant possession is the date maintenance charges and contribution to the sinking fund are imposed on a purchaser or proprietor of a parcel. Subsection 52(3)
H of the SMA provides how the contribution to the sinking fund is calculated. It is sum equivalent to 10% of the maintenance charges. To appreciate the scheme s. 52 of the SMA is reproduced below:

(1) **Each proprietor shall pay the Charges, and contribution to the sinking fund, to the management corporation** for the maintenance
I and management of the subdivided building or land and the common property in a development area,

(2) **During the preliminary management period, the amount of the Charges to be paid under subsection (1) shall be determined by the developer in proportion to the share units assigned to each parcel,**

(3) The **amount of the contribution to the sinking fund to be paid under subsection (1) shall be a sum equivalent to ten per cent of the Charges.** (emphasis added)

[28] Thus, Schedule H of the Housing Development (Control and Licensing) Regulations 1989, ss. 46, 48 and 52 of the SMA are interlinked. The maintenance charges are calculated according to the formula in Fifth Schedule stated in sub-cl. 19(3) of Schedule H by the developer. The developer cannot make the calculation of the maintenance charges by any other formula or method. The maintenance charges and contribution to the sinking fund so calculated are paid by the purchasers or proprietors of the parcels to the developer during the 'preliminary management period'. This period expires one month after the date the MC had conducted its 1st AGM as provided under the SMA.

[29] The maintenance charges and the contribution to the sinking fund after the 'preliminary management period' has expired is then the responsibility of the MC. In giving a purposive interpretation to Schedule H of the Housing Development (Control and Licensing) Regulations 1989 and ss. 46, 48 and 52 of the SMA the maintenance charges will be determined according to the same formula even after the MC has taken over from the developer. The change in the maintenance charges would take place if there was a change in the monthly expenses and/or yearly expenses brought about by a change in any of the 26 items set out in the Fifth Schedule of Schedule H. A change to the maintenance charges would naturally bring a change to the contribution to the sinking fund as the latter is statutorily fixed at 10% of the former. But the number of share units that has been assigned to each parcel does not change.

[30] In the instant case the developer had determined the maintenance charges at RM2.22 for apartment parcels and RM0.11 for the commercial parcels while the contribution to the sinking fund was fixed at RM0.30 for the apartment parcels and RM0.06 for the commercial parcels. This amount was imposed throughout the 'preliminary management period'. It is clear that the developer has by fixing different rates for apartment parcels and commercial parcels has contravened cl. 19 of Schedule H of the Housing Development (Control and Licensing) Regulations 1989 and s. 52(3) of the SMA. As shown above, the rates must be the same during this period for all parcels whether it is an apartment parcel or a commercial parcel.

[31] In the instant case, the proprietors of the apartment parcels pay a massive RM2.22 per share unit for maintenance charges while the proprietors of the commercial parcels merely pay a token of RM0.11 per

share unit. Apart from not complying with the formula to determine the amount per share unit held by each parcel owner the calculation of the contribution to the sinking fund is also incorrect as it is not equivalent to 10% of the maintenance charges. Further in the instant case, the first respondent has charged the proprietors of the apartment parcels RM0.30 as contribution to the sinking fund when the amount is only RM0.22 based on the fixed statutory formula *ie*, 10% of the maintenance charges. I therefore hold that the developer's determination of the maintenance charges is in clear violation of the Fifth Schedule in Schedule H of the Housing Development (Control and Licensing) Regulations 1989 and s. 52 of the SMA.

[32] On the true construction of the relevant provisions the imposition of different rates for maintenance charges and contribution to the sinking fund imposed by the first respondent is therefore unlawful, null and void. For the above reasons, I answered part (i) of the question in the negative.

The MC, Maintenance Charges And Sinking Fund

[33] I now revert to part (ii) of the question posed for determination. The question is whether on the true construction of the relevant provisions the imposition of the maintenance charges and contribution to the sinking fund by the MC is valid in law.

[34] In the instant case, the MC took over the management and maintenance of Pearl Suria from the first respondent on 25 February 2019. At its 1st AGM, held on 26 January 2019, the MC resolved to maintain the amounts imposed by the first respondent until 31 March 2019 and thereafter from 1 April 2019 the following amounts would be imposed:

(i) apartments parcels – maintenance charges at RM2.92 and contribution to sinking fund at RM0.30.

(iii) commercial parcels – maintenance charges at RM0.11 and contribution to sinking fund at RM0.06.

[35] This means that the MC had only raised the maintenance charges for apartment parcels commencing 1 April 2019. The contribution to the sinking fund for apartment parcels and the rates for the commercial parcels were left unchanged. In my judgment by maintaining the different rates for apartment parcels and commercial parcels as determined by the first respondent, the MC has continued to apply the unlawful amounts determined by the former as explained in the preceding paragraphs. For this reason, the amounts for the maintenance charges and contribution to the sinking fund maintained by the MC from 25 February 2019 to 31 March 2019 is unlawful, null and void.

[36] I now proceed to the imposition of the maintenance charges and contribution to the sinking fund commencing 1 April 2019 that was resolved by the MC in its 1st AGM by a majority of the votes. At the 1st AGM the

MC is required to by para. (c) of s. 58 of the SMA to confirm or vary any amount determined as maintenance charges, or contribution to the sinking fund. The MC chose to maintain the maintenance fund until 31 March 2019 and thereafter on 1 April 2019 to increase by RM0.70 the maintenance charges for apartment parcels while RM0.11 remain the maintenance charges for the commercial parcels. The power of the MC to collect maintenance charges and contribution to sinking fund is provided by sub-s. 59(2) of the SMA which state as follows:

> The powers of the management corporation shall be as follows:
>
> (a) to collect the Charges **from the proprietors in proportion to the share units** or provisional share units of their respective parcels or provisional blocks;
>
> (b) to **collect the contribution to the sinking fund from the proprietors of an amount equivalent to ten percent of the Charges;**
>
> (emphasis added)

[37] The other provision is s. 60 of the SMA. Subsection 60(3) provides that:

> Subject to section 52, for the purpose of establishing and maintaining the maintenance account, the management corporation may at a general meeting:
>
> (a) determine from time to time the amount to be raised for the purposes mentioned in subsection 50(3);
>
> (b) *raise the amounts so determined by imposing Charges on the proprietors in proportion to the share units* or provisional share units of their respective parcels or provisional blocks, *and the management corporation may determine different rates of Charges to be paid in respect of parcels which are used for significantly different purposes* and in respect of the provisional blocks; and
>
> (c) determine the amount of interest payable by a proprietor in respect of late payments which shall not exceed the rate of ten per cent per annum. (emphasis added)

[38] Thus, the MC can only raise the amount it had determined for the purposes of sub-s. 50(3) at a general meeting for the imposition of the maintenance charges in proportion to the share units but the MC is allowed to determine different rates to be paid in respect of parcels which are used for 'significantly different purposes'. The issue that arises is the interpretation to be accorded to sub-s. 59(2) and sub-s. 60(3) of the SMA *vis-a-vis* the power to determine maintenance charges.

[39] It was submitted that sub-s. 60(3) of the SMA allows the MC to impose different rates as the parcels in the instant case are used for significantly different purposes *ie*, residential parcels and commercial

parcels. Relying on this dichotomy it was contended that the imposition of the different rates commencing 1 April 2019 was valid being in accordance with written law.

[40] In applying the purposive approach the intention of the Legislature was for an equitable sharing of the maintenance charges by way of the proportion of the share units as stipulated in the Fifth Schedule in Schedule H of the Housing Development (Control and Licensing) Regulations 1989 and sub-ss. 52(2) and 59(2) of the SMA. The rate would be the same for all parcels based on the proportion of share units for each parcel.

[41] The maintenance charges and the contribution of the sinking fund are paid by the proprietors which go into the accounts mentioned in sub-ss. 50(2) and 51(1) of the SMA. These monies cannot be used for other purposes other than those stated in sub-ss. 50(3) and 51(2) of the SMA. The MC is only allowed to impose different rates where the parcels are used for 'significantly different purposes'. In my view a proper reading of the provisions based on the purposive approach is that the MC can only exercise the power in sub-s. 60(3) of the SMA where it can be shown the affected parcels are subsequently used for 'significantly different purposes' from the original purpose.

[42] In my view the phrase 'significantly different purposes' refer to the purpose of each parcel in relation to the original purpose of each parcel has already been allocated its respective share units. There must be a significant change from its original purpose to entitle a different rate to be imposed. In other words, sub-s. 60(3) of the SMA is an exception to the general rule provided by sub-s. 59(2) of the SMA. The uniform rate remains based on the proportion to share units each parcel holds until it can be shown that the parcels are used for 'significantly different purposes'. This interpretation is in accord with the purposive approach to protect the apartment proprietors who are the weaker position.

[43] The case of *Sodalite Sdn Bhd & Ors v. 1 Mont' Kiara Dan Kiara 2 Management Corporation & Ors* [2021] 7 CLJ 633 concerned the interpretation of sub-s. 60(3) of the SMA. There it was held as follows:

> [25] ... The decision of the MC to impose any form of charges must abide by the requirements of section 60(3) of the said Act. Having analysed the legislation, the First Schedule provides the mechanism as to how the allocated share units are to be calculated. The factors identified by Defendants' counsel are merely factors that go to the weightage in the formula as provided in item 2 of the First Schedule. They do not go into the factors that should be considered by MC for the purposes of section 60(3) of the Strata Management Act if it intends to differentiate the charges based on the "different purposes" of each parcel. ...

> [32] The difference is not restricted to be merely between what is commonly referred to as either "commercial" or "retail" or "residential" use. That is not the criteria that are specifically stated in s. 60(3) of the Strata Management Act. What must be shown is that use of the parcels are significantly different to those of other parcels. Given those differences, the rates of charges may be different but must still be reasonable and not arbitrary. Therefore, this will depend on the facts of each case.

[44] In my view sub-s. 60(3) of the SMA is not applicable in the instant case. The use of the parcels here had from the beginning been the same. Nothing has changed. The parcels have not been used for a significantly different purpose. The justification to impose a different rate by invoking sub-s. 60(3) of the SMA is absent. The imposition of the maintenance charges by the MC on the apartment parcels is therefore illegal.

[45] On the true construction of sub-ss. 59(2) and 60(3) of the SMA the imposition of different rates for maintenance charges and contribution to the sinking fund imposed by the MC is therefore unlawful, null and void. For the above reasons, I answered part (b) of the question in the negative.

Different Rate Passed By Majority At The AGM

[46] One other submission remains to be addressed here. It was submitted that the rates imposed in the 1st AGM were passed by majority votes and not subject to interference. I disagree. Any resolution passed at the AGM which is in contravention of the provisions of the SMA is illegal and therefore null and void. The majority cannot override a statutory provision. The principle was stated by the Court of Appeal in *Muhamad Nazri Muhamad v. JMB Menara Rajawali & Anor* [2019] 10 CLJ 547 in the following paragraph:

> [40] Be that as it may, does the fact that the JMB's resolution was carried by a unanimous vote make it perfectly legal and valid for the JMB and JMC to fix and collect the different rates of the maintenance charges. The learned judge took the view that it would. However, we take a different view. The JMB as a body corporate under statute can only determine charges which are mandated under the SMA 2013. It will be *ultra vires* the SMA 2013 for the JMB and the JMC to fix and impose the different rates which are not sanctioned by statute. Further, the JMB does not have the inherent power nor can it arrogate to itself such power, even if the approval was obtained in a unanimous resolution at the AGM (*Malaysia Shipyard & Engineering Sdn Bhd v. Bank Kerjasama Rakyat (M) Bhd*, (*supra*)).

Failure To Exhaust Statutory Remedy

[47] It was submitted that the failure of the applicant to exhaust the statutory domestic remedy provided by sub-s. 52(6) of the SMA is fatal. It was argued that the statutory domestic remedy provided was not utilised by the applicant and instead the applicant resorted to this court which is an

abuse of the process of the court. Subsection 52(6) of the SMA provides a remedy against the imposition of maintenance charges and contribution to the sinking fund by the developer (first respondent) as follows:

> Any proprietor who is not satisfied with the sums determined by the developer under subsection (2) or (3) may apply to the Commissioner for a review and the Commissioner may:
>
> (a) determine the sum to be paid as the Charges, or contribution to the sinking fund; or
>
> (b) instruct the developer to appoint, at the developer's own cost and expense, a registered property manager to recommend the sum payable as Charges, or contribution to the sinking fund, and submit a copy of the registered property manager's report to the Commissioner.

[48] Further, it is argued that sub-s. 52(7) of the SMA provides the remedial mechanism for any objections with regard to the rates that were imposed made to the COB, namely, that the COB is empowered to impose the maintenance charges and contribution to the sinking fund as he thinks just and reasonable based on the report received under para. (b) of sub-s. 52(6) of the SMA.

[49] In my judgment the questions in the instant originating summons concerns the proper interpretation to be accorded to certain provisions of the Strata Management Act 2013 ("SMA"), the Strata Titles Act 1985 ("STA"), the Housing Development (Control and Licensing) Act 1966, the Housing Development (Control and Licensing) Regulations 1989, in particular, Schedule H as prescribed in reg. 11 thereof. The questions concern the formula or manner of calculating the maintenance charges and contribution to the sinking fund by the developer of a subdivided building and thereafter by the management corporation of the said building and to determine the question whether the imposition of different rates on apartment parcels and commercial parcels are in accordance with the law. In the circumstances, the proper forum to ventilate these questions of law is the High Court and therefore the principle stated in *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505 has no application on the facts and circumstances of the instant case.

[50] Therefore, the domestic remedy objection is without basis and is dismissed.

Failure To Proceed By Way Of Judicial Review

[51] It is submitted that the applicant ought to have proceeded to file an application for a judicial review to challenge the decision of the Tribunal instead of filing the instant originating summons. It is not disputed that the applicant prior to filing this originating summons had filed a claim against the MC at the Strata Management Tribunal but that claim was struck out on 14 November 2019 with liberty to file afresh.

[52] I found this objection devoid of merit for the following reasons:

(i) Firstly, there was no decision made by the Tribunal determining the rights of the applicant and the MC. The threshold for judicial review has not arisen. Thus, the elaborate submissions made delving into the issue of public law and private law and the citation of principles in cases such as *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 was totally irrelevant and misconceived.

(ii) Secondly, since the claim before the Tribunal was struck out, the claim is to be regarded as never been filed. Section 106 of the SMA provides that the jurisdiction of the court is not excluded where the claim before the Tribunal is withdrawn, abandoned or struck out.

(iii) Thirdly, the applicant then did not claim against the first and the second respondents who are the appropriate contradictors for the declarations being sought in this originating summons. Thus, the questions posed for this court's determination is not within the jurisdiction of the Tribunal and the most appropriate forum to seek the declarations sought is the High Court.